



July 31, 2019

Dan Rubins
Via email: 76635-16430093@requests.muckrock.com

RE: Your CPRA request dated July 4, 2019

Dear Dan Rubins:

We are further responding to your California Public Records Act (CPRA) request received in an email on July 4, 2019. You are seeking all "Brady lists," Giglio lists," "potential impeachment disclosure lists," or any compiled records or lists of records of the type set forth in California Penal Code section 837.7(b)(1)(C).

We have some disclosable records available to you and we have transferred those records to a CD-ROM which have been placed in our outgoing mail. We continue to work on the remaining records and will have those available to you on or before August 23, 2019.

The materials in our Brady Bank are generally exempt from disclosure under Government Code section 6254(f), the deliberative process privilege, the attorney work product privilege, Government Code section 6255, Evidence Code section 1040, and Penal Code section 832.5. Under recent changes to the Public Records Act, however, some of the materials are disclosable notwithstanding these exemptions.

Generally, "the personnel records of peace officers and custodial officers and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." (Pen. Code, § 832.7(a).) As a result, police officer personnel records cannot be released unless they fall within an exception. Penal Code section 832.7 creates four exceptions to the general rule of confidentiality of peace officer personnel files: 1) records relating to the discharge of a firearm at a person by a peace officer or custodial officer; 2) the use of force by a peace officer or custodial officer resulting in death or great bodily injury; 3) sustained findings of sexual assault involving a member of the public; and 4) sustained findings of dishonesty.

Both categories 3 and 4 require proof of "sustained findings." "Sustained" means a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code, that the actions of the peace officer or custodial officer were found to violate law or department policy."

(Pen. Code, § 832.8(b).) In general, we do not have information as to whether conduct we are aware of for Brady purposes resulted in sustained findings, and can only refer you to the employing agencies in the absence of such information. Nevertheless, we are releasing records of either "sexual assault" or dishonesty that resulted in criminal prosecutions of officers engaged in such conduct as defined in Penal Code section 832.7's categories of sexual assault or dishonesty. The filing of criminal charges, in our opinion, satisfies the definition threshold determination of a sustained finding of a violation of law as contemplated in Penal Code section 832.8.

With respect to each of the four exception categories listed under section 832.7, please note the following:

Categories 1 and 2 involve the discharge of a firearm or use of force by an officer. We have Brady records regarding two incidents. The first involves the criminal prosecution of an officer for an off duty assault; the responsive records are included in this production. The second is the murder prosecution of former BART Police Officer Johannes Mehserle that resulted in an involuntary manslaughter conviction. These files are quite voluminous and will require additional time to review and redact as required by section 832.7. We estimate that the review would take an additional three months. We note that there has been considerable media coverage of this case and we imagine you are well familiar with it. Please let us know if you would like us to proceed with the production of these records, or if there is something more discreet that we can produce for you more quickly.

"Sexual assault," under category 3, is defined as "the commission or attempted initiation of a sexual act with a member of the public by means of force, threat, coercion, extortion, offer of leniency or other official favor, or under the color of authority. For purposes of this definition, the propositioning for or commission of any sexual act while on duty is considered a sexual assault." With regard to sexual misconduct by an officer, we are authorized to provide only those records that fall within this exception.

Records relating to dishonesty, under category 4, are records "relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence." (Pen. Code, § 832.7(b).) With regard to dishonesty, we provide only those documents that resulted in criminal prosecution and that fall within this exception

Please note that section 832.7 seems primarily aimed at the production of records by employing agencies rather than by a District Attorney's Office. As a result, any information that the District Attorney's Office provides will be incomplete. While an employing agency will have information about all complaints made against an officer, the

District Attorney's Office will generally have only that information referred to us voluntarily by the employing agency. While the employing agencies will know whether there are sustained findings, the District Attorney's Office generally will not have information as to whether there was or was not a sustained finding as to any particular complaint. Further, while the District Attorney's Office strives to maintain records that relate to our duty to disclose exonerating evidence under *Brady v. Maryland*, not all Brady material falls under section 832.7, and not all 832.7 conduct is necessarily Brady material. Finally, while our Brady information is centralized, we have no way of tracking other cases or materials that may be in our possession that would fall under section 832.7. Thus, the records we produce represent our best effort to comply with section 832.7, even though there may be some records we are unable to locate or reproduce.

Finally, please note that the records provided have been redacted as required by section 832.7, and as necessary to assert any privileges still applicable. If you have any questions, please feel free to contact the undersigned.

Thank you for your patience.

Very truly yours,

NANCY E. O'MALLEY
District Attorney

By:



Micheal O'Connor, Assistant District Attorney
Custodian of the Record